Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of Implementation of Section 621 (a) (1) of the Cable Communication Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992	§ § § §	MB Docket No. 05-311 FCC 05-189

COMMENTS OF THE TEXAS MUNICIPAL LEAGUE AND THE TEXAS CITY ATTORNEYS ASSOCIATION

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Scott N. Houston
Texas Municipal League
Texas City Attorneys Association
1821 Rutherford Lane, Suite 400
Austin, Texas 78754
Telephone: (512) 231-7400
Facsimile: (512) 231-7490
E-mail: shouston@tml.org
ATTORNEY FOR TML and TCAA

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I. Introduction

The Texas Municipal League (TML) and the Texas City Attorneys Association (TCAA) respectfully submit these comments in the above-mentioned Notice of Proposed Rulemaking (NPRM). TML is a nonprofit association of approximately 1,080 Texas cities that provides educational, legislative, and legal services to our members. TCAA, an affiliate of TML, is an organization of over 400 attorneys who represent Texas cities and city officials in the performance of their duties.

TML and TCAA advocate the common interests of Texas cities before legislative, judicial, and administrative bodies. We take action only when a legislative, administrative, or judicial body is considering matters of law or policy that will affect all or most Texas cities. We do not weigh in on matters

that are unique to one or a few cities, or are based on factual rather than legal or policy issues. TML and TCAA are submitting these comments because the issues in this NPRM are of great importance to all Texas cities and, if not properly construed, may create great uncertainty for cities that rely on the current Texas system of cable franchising.

The NPRM requests comments on two overarching questions: (1) whether local franchising authorities are unreasonably refusing to grant competitive franchises; and (2) whether the Federal Communications Commission (Commission) has authority to implement the competitive mandate of Section 621(a)(1). TML and TCAA respectfully submit that the answer to both questions is "no," and provide the following comments in support of that contention.

II. Reasonableness of Texas Franchising Process

Texas cities have always encouraged competitiveness in the local cable market. More providers means more competition, and more competition often means lower rates, a higher level of customer service, and more channel options for city residents. Texas cities share the Commission's view that such benefits usually come from the competitive pressures of multiple franchisees in a city. In addition, cities often compete for new business

prospects, and the city with the best technology choices often wins an economic development prospect.

For many years in Texas, cable companies were the sole provider of wire-based video programming to city residents. Until recently, a cable company that wanted to serve customers within a Texas city did so by obtaining a franchise agreement from that city pursuant to the 1984 Cable Act. Federal law requires a city to issue a franchise agreement, and Texas law provides that compensation for the use of a city's rights-of-way is required.[1]

During the period in Texas when cities were the sole franchising authority, they negotiated literally thousands of initial cable franchises, renewal franchises, amendments, and dozens of additional competitive cable franchises. Each of those was the result of reasonable, good-faith, negotiations, and TML and TCAA are not aware of any reported legal action against a Texas city for the unreasonable refusal to grant a franchise. In larger cities, competitive cable franchises are not unusual. The typical competitive cable franchise was granted in a matter of months of actual negotiation time. Additional competitive franchises will typically contain provisions substantially similar to the incumbent cable provider's franchise.

[1] *See* 47 U.S.C. § 541(d); TEX. CONST. Article III, § 52; TEX. REV. CIV. STAT. Article 1175.

If agreeable, these franchises were generally negotiated over about a six-month period.[2]

Cable services cannot be provided unless there is a cable franchise granted by the franchising authority.[3] "Franchising authority" is defined as "any governmental entity empowered . . . to grant a franchise."[4] The designation of the "franchising authority," whether it is a city or the state, is determined by state law. In Texas, until September 1, 2005, the local franchising authority was a city. Because of ever-growing technological capabilities, telecommunications companies now have the ability to provide video programming, usually through the use of fiber optic networks. Therefore, these companies wanted Texas' local franchise system reformed so that they would not have to obtain hundreds of franchises, which they felt would be an impediment to installing the infrastructure necessary to implement their new technology.

Texas cities were interested in reaching an agreement on a new compensation system that would provide cities with stable and predictable compensation for use of the public rights-of-way. Cities also wanted to

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[2] The Texas Cities Coalition for Franchise and Utilities Issues (TCCFUI) eloquently addresses specific examples of how Texas cities have granted franchises in their original comments, pp. 8-15. As such, TML and TCAA will not repeat those examples here.

[3] 47 U.S.C. § 541(d).

[4] 47 U.S.C. § 522(10).

ensure that all technologies and services, including cable and newer technologies, that use the public rights-of-way pay a fair and equitable fee for use of the public's land. In addition, cities wanted to ensure that they retained police-power authority over their rights-of-way and were still able to provide public, educational, and governmental programming to their citizens.

In 2005, the Texas legislature asked cities, cable providers, and telecommunications companies to reach a compromise on problems related to the current right-of-way compensation system for companies that provide cable services to city residents. The end result, after several failed bills, much negotiation, one regular legislative session, and two special legislative sessions, was Senate Bill 5. S.B. 5 does many things, including creating a new Chapter 66 of the Texas Utilities Code, and represents a compromise that was acceptable to cities.

While the bill makes numerous changes to telecommunications, cable, and broadband laws, the most important elements of Chapter 66 for purposes of this discussion are the following:

1. It creates a statewide cable and video franchise to be administered by the Texas Public Utility Commission (PUC).

2. It requires an entity seeking to provide cable or video service in Texas after September 1, 2005, to file an application with the PUC for the state-issued certificate of franchise authority.
3. It requires the PUC to issue a certificate of franchise within 14 business days of the receipt of an application, provided that, among other things, the applicant: (a) agrees to comply with all federal laws and regulations; (b) agrees to comply with all city regulations regarding the use of the public rights-of-way, including the police powers of the city; and (c) provides a description of the service area footprint to be served.
4. It provides that a state-issued certificate of franchise shall contain a grant of authority to use a city's rights-of-way, subject to the police powers of a city.
5. It provides that the certificate of franchise is fully transferable to successors in interest.
6. It prohibits a city from requiring a statewide franchise holder to: (a) maintain a business office in the city; (b) obtain bonding or insurance for activities within the city; or (c) pay any fee for a permit to work in the city's right-of-way, except that the city may require a statewide franchise holder to register with the city and maintain a point of contact.

7. It provides that: (a) a city must promptly process any request from a statewide franchise holder to construct or maintain any facilities in the city's right-of-way; and (b) a provider may begin work under certain circumstances without a permit, if it notifies the city as promptly as possible after work begins.

Several cable providers have applied for, and received, a state-issued certificate of franchise authority. *See State-Issued Certificate of Franchise Authority Directory*, available at http://www.puc.state.tx.us/cable/directories/CFA/CFA_Directory.htm. In total, the PUC has granted statewide franchise certificates of authority covering 210 local jurisdictions. Some telecommunications providers have used the S.B. 5 provisions to begin "rolling out" video services through new technology using fiber optic lines. In fact, as Verizon stated in its comments filed at the Commission just after adoption of S.B. 5:

> "[T]he State of Texas recently enacted legislation that permits video services (sic) providers to obtain authorization from the state to provide video services in place of individually negotiated, local franchises. Verizon applauds any such efforts to streamline the cumbersome franchising process, and anticipates that the result will be accelerated deployment of competitive video services in the state."[5]

[5] *Verizon Comments*, page 7, footnote 8.

And the Commission noted that the new Texas legislation was among "recent efforts at the state level [that would] … facilitate entry by competitive cable providers." [6] In Texas, every application for a state-issued cable or video franchise has been granted within seventeen business days. It seems clear that S.B. 5 essentially obliterates any objections to the "unreasonableness" of cable franchising process in Texas.

III. Commission Authority and Compensation for Public Rights-of-Way

The Commission asks "[H]ow the primary justification for a cable franchise – i.e., the locality's need to regulate and receive compensation for the use of public rights-of-way – applies to entities that already have franchises that authorize their use of the rights-of-way."[7] In Texas, some telecommunications or electric providers may claim a "pre-existing franchise" or other similar authority to use the public rights-of-way. As previously mentioned, S.B. 5 negates any such claim by requiring any cable or video provider to obtain a state-issued certificate to provide cable services, and to pay a city in accordance with the bill. While some may argue that providing cable service with existing infrastructure does not impose any additional

[6] NPRM, para. 9.

[7] NPRM, para. 22.

burden on the rights-of-way, such an argument overlooks the historical fact that the burden on the rights-of-way is not the basis for compensation in Texas. Public right-of-way compensation in Texas is value-based. A value-based fee is based on the concept that the more revenue is attributable to the private use of the public rights-of-way, the greater its value. As in a cable franchise based on a percentage of the provider's revenue, the total franchise fee payment increases as the provider's revenues increase. There is no greater burden on the rights-of-way, but the right-of-way is more valuable. The same is true of an entity offering additional services through existing infrastructure.

TML's and TCAA's position is that neither Congress, nor the Commission, has authority to reduce the fee paid to Texas cities for the use of public rights-of-way. Under the Texas Constitution, a city is prohibited from granting any thing of value to a private entity. [8] As such, a cable provider must pay compensation for the use of a city's rights-of-way, and the payment of value-based street rental fees for use of the public rights-of-way has been upheld by both the United States and Texas Supreme Courts.[9] In fact, the U.S. Supreme Court has additionally held that Congress is prohibited from

[8] TEXAS CONST. Article III, § 52, see *Pasadena Police Association v. Pasadena,* 497 S.W. 2d 388 (Tex. Civ. App. – Houston [1st Dist.] 1993).

[9] *See, e.g., City of St. Louis v. Western Union Telegraph Company*, 148 U.S. 92 (1893); *Fleming v. Houston Lighting and Power,* 138 S.W.2d 520 (Tex. 1940).

confiscating local public property without compensation for the same reasons it may not confiscate private property. As such, the Commission is arguably prohibited from allowing the use of a Texas city's rights-of-way without requiring the payment of value-based compensation for that use.

IV. Conclusion

TML and TCAA recognize the comments of Texas cities[10] and ask the Commission to avoid changes that would negatively affect Texas cities. The Texas legislature has streamlined the cable franchising process in Texas, and provides for an almost immediate grant of authority to provide service. If the Commission intends to establish new standards or requirements for cable franchises, we request that those changes do not undercut or diminish the standards set out in Texas' hard-fought S.B. 5. In fact, TML and TCAA submit that, if anything, the standards and requirements in S.B. 5 be used as a model for any federal-level changes.

Respectfully Submitted,

Scott N. Houston
Texas Municipal League
Texas City Attorneys Association
1821 Rutherford Lane, Suite 400

[10] North Richland Hills, Killeen, Midland, Fort Worth, Garland, and others, as well as the eighty-plus cities of TCCFUI.

Austin, Texas 78754
Telephone: (512) 231-7400
Facsimile: (512) 231-7490
E-mail: shouston@tml.org
ATTORNEY FOR TML and TCAA